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October 11, 1983

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Re: U.S.A., et al. v. Reilly Tar & Chemical Corporation, et al.
Civil No. 4-80-469

Gentlemen:

Enclosed and served upon each of you please find a copy of the Reply Memorandum in Support of Reilly Tar & Chemical Corporation's Motion for Reconsideration or Other

Alternative Relief and the Affidavit of James E. Dorsey III with Exhibit 1 thereto.

Very truly yours,

James E. Dorsey, III

JED:pro
Enclosures

cc: Paul Zerby, Esq.
Robert Leininger, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey, III, its Department of Health, and its Pollution Control Agency,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION; HOUSING AND REDEVELOPMENT AUTHORITY OF ST. LOUIS PARK; OAK PARK VILLAGE ASSOCIATES; RUSTIC OAKS CONDOMINIUM, INC.; and PHILIP'S INVESTMENT CO.,

Defendants,

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

REPLY MEMORANDUM IN SUPPORT OF REILLY TAR & CHEMICAL CORPORATION'S MOTION FOR RECONSIDERATION OR OTHER ALTERNATIVE RELIEF

I. INTRODUCTION AND SUMMARY

In its initial memorandum in support of this motion, defendant Reilly Tar & Chemical Corporation ("Reilly") presented authority that a contract implied in fact may be established by both circumstantial and direct evidence showing a mutual intention to contract. That memorandum went on to point out that, given that body of law concerning contracts implied in fact, the court's ruling striking Reilly's defense based on that theory was both incorrect and premature -- incorrect because the court had drawn inferences contrary to the nonmoving party in the context of a motion for a summary judgment and premature because Reilly has a pending motion to compel discovery of evidence relevant to the summary judgment motion and has not completed other discovery relevant to that issue. That memorandum also suggested that, if the court chose neither to reverse its order nor to vacate it pending the conclusion of discovery, the court should certify the issue for interlocutory appeal pursuant to 28 U.S.C. 1292(b).

The State of Minnesota ("State") and the City of St. Louis Park ("City") have each filed a memorandum in opposition. In its memorandum, the City does not deny that it acted as the agent for the state in the the settlement of the 1970 litigation. Rather, it simply concludes without a

discussion of the facts that Reilly had no right to believe that the City was acting as the State's agent.[1/]

The State's memorandum reads more like a closing argument to a jury then it does like a brief submitted in the context of a motion for a summary judgment. It is replete with characterizations of and inferences from the State's own selected facts, including yet another reference to the affidavit testimony of the State's former counsel, Mr. Lindall, to whom Reilly has been denied deposition access concerning the very matters he has testified to in his affidavits on which the State so heavily relies.[2/] This, of course, only serves to highlight the basis for Reilly's motion: that the order granting the summary judgment was improper because it was based upon inferences contrary to the non-moving party and untimely because it was granted while discovery and a discovery motion were still pending.

1/ The City devoted the rest of its memorandum to arguing that its settlement with Reilly was very narrow. The scope of the settlement is not before the court on this motion and shall not be discussed further.

2/ Reilly's entitlement to full discovery (and not merely some limited form controlled by the State) concerning Mr. Lindall and other relevant actors in the initiation and settlement of the 1970 suit is, as the Court will recall, the subject of Reilly's pending motions to compel, and Reilly has submitted briefs on the subject, to which the Court is again referred. See Reilly's memorandum, dated June 24, 1983, in support of its Motion to Compel; Reilly's Memorandum, dated July 14, 1983, in support of its Second Motion to Compel.

The State's "responsive" brief is principally an effort to distract this Court from proper reconsideration of what Reilly believes was an erroneous and improper decision concerning Reilly's settlement defense. The State, for instance, insists that it is "essential" for the Court to consider each aspect of Reilly's arguments separately only, rather than to view them in the context of the whole. This technique allows the State to mischaracterize Reilly's arguments and then to knock down the straw men of its own creation. Thus, the State would have this Court believe that Reilly is arguing for adoption of a purely subjective theory of contract formation or for recognition of an agency relationship where delegation of authority is barred by law.

Such mischaracterizations do not require a response so much as a refocusing. The Court must view this issue in the interrelated context of the real world and not the academic, divided isolation into which the State would thrust it. Viewed in the proper context, Reilly continues to submit that the facts and inferences drawn therefrom (which inferences are to be drawn to Reilly's favor at this point) show that this Court's decision was both incorrect and premature.

II. ARGUMENT

A. The State, which had never been involved in any of the decades of dialogue between the City and Reilly, played a secondary role throughout the 1970 litigation and, by virtue of its actions and inactions, became bound by the settlement between the City and Reilly.

As discussed in more detail in Reilly's memorandum, dated June 24, 1983 (in opposition to the State's motion for summary judgment), the Court must remember that the 1970 lawsuit arose in the context of the City's efforts to acquire Reilly's property. The State knew of the City's interest in the property before the suit was instituted. From the beginning the City was the instigator and the initiator, and the State went along. For instance, Mr. Michael Lutz of the MPCA inspected the Reilly property on April 20, 1970. During that inspection he told Mr. Justin of Reilly that the State was not too concerned about Reilly at that time and that he (Lutz) was inspecting merely at the request of the City. See Memorandum from W. A. Justin to H. L. Finch dated April 21, 1970 attached as Exhibit 1 to the Affidavit of James E. Dorsey III submitted herewith. Moreover, when the 1970 lawsuit was initiated and Reilly personnel inquired why Reilly had not been previously notified by the State, "Mr. Lindahl explained that they [the State] worked through the City and assumed that the City would notify us [of matters relating to the litigation]." RTC Ex. 9. The numerous other instances discussed in Reilly's prior brief need not be reiterated here. See, e.g., Reilly's Reconsideration Memorandum at pp. 5-7, 14-17; Reilly's

Memorandum, dated June 24, 1983, in opposition to the State's motion for summary judgment at pp. 4-14; see also, Reiersgord Affidavit of June 23, 1983; Ryan Affidavit of May 8, 1978.

This, then, is the context in which the settlement occurred: the City and Reilly were--and had been--negotiating concerning the sale of the property, and both the City and the State had told Reilly in so many words that the City was carrying the ball in the lawsuit. The message sent to Reilly, at the time and in this context, was that, insofar as the State was concerned, it was looking for a responsible party to take over the property. If that occurred through sale of the site to the City, then the State would regard the matter as over between it and Reilly and would take no further action against Reilly. Reilly acted on that basis, and the State's subsequent actions and inactions confirmed that that was the agreement.

Such indications as we currently have of the State's contemporaneous view of the matter, pending the completion of discovery, confirm the above. For example, the staff of the MPCA understood that the State would look to the owner of the site for funding of further studies and for clean-up, see RTC ex. 25, and that the imminent sale of the property would mean that Reilly would drop out of the picture as far as the State was concerned. Thus, the staff suggested that the City might want to get Reilly to factor in the cost of a study in the purchase price before buying the property, or that Lindall "might want to take some action to prevent [Reilly] from

selling the Land until the matter of the study and possible future work is resolved." RTC ex. 28.

These items and other evidence previously discussed[3/] demonstrate that State personnel knew the significance of the imminent sale as far as Reilly was concerned and go far toward proving the State's contemporaneous view of the events in question. Moreover, contrary to the assertions in the State's brief that contemporary documents do not support Reilly's allegation that Mr. Lindall had committed the State to a settlement with Reilly if the land purchase negotiations proved successful (see State's brief at p. 6, n.3), Lindall himself explained these terms to the MPCA board at the time.[4/] The board's own minutes indicated that Lindall

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3/ This evidence has been set out in: (1) Reilly's memorandum, dated June 24, 1983 (in opposition to the State's motion for summary judgment) at pp. 8-14; (2) Affidavit of Thomas E. Reiersgord dated June 23, 1983; (3) Reilly's Reconsideration Memorandum, dated September 16, 1983 at pp. 5-6, 14-17; and (4) Affidavit of Thomas E. Reiersgord dated September 15, 1983.

4/ The State has an alarming proclivity for introducing fact disputes in the context of what is still a summary judgment matter and then presenting its view of the facts as the only "objective" view possible. In footnote 3 of its brief the State quotes part of RTC ex. 16, a letter from the City's attorney to Reilly's counsel dated July 30, 1971. The State first chooses to omit a crucial sentence from that letter and then tries to press upon the Court an inference contrary to Reilly's interests. Reilly has introduced the exhibit to show that the State, by striking the lawsuit from the trial calendar, communicated its intent to settle the lawsuit upon the sale of the land. When the letter is read in full, <u>including</u> the sentence that "[w]e are taking this action [striking the lawsuit from the calendar] with the expectation that a mutually

told the MPCA that he expected Reilly and the City would "reach some resolution or price" for the sale of the site, and that the case would never go to trial if that happened, explaining that "[t]he matter has been stricken from the trial calendar while the negotiations are being held with the proviso that if the negotiations fail the matter could be placed back on the calendar." RTC ex. 18 (emphasis added).[5/] This also serves to rebut the State's claim that the MPCA board was neither informed of nor considered the settlement Reilly alleges. The

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4/ (Footnote Continued)

acceptable agreement will be negotiated between the City and the company for the purchase of the company's property," the inference advanced by Reilly is reasonable and, in this context, should be accepted by the Court. Reilly's point is further buttressed by the fact that a copy was sent to Lindall who, upon receipt, was silent, thus confirming the accuracy of the Macomber's recitation of the decisions he and Lindall had reached.

5/ The State makes much of the fact that the letter to the clerk stated that the case should be struck pending the reinstatement at any time. Somehow the State seems to think that that means that the case was struck from the calendar for reasons other than the negotiations surrounding the sale of land which would in turn lead to the settlement of the suit. That letter to the Clerk of Court (who really does not care why a case is going to be struck and who only wants to know whether it may be reinstated) is much less probative of the reasons why the case was struck from the calendar than is the statement in the minutes of the MPCA board meeting. In those minutes, RTC Exhibit 18, the real reason for its being struck is given to the people who want to know. The real reason and the only reason was the purchase of the land - which was the ultimate goal of the litigation in the first place. In state court practice, cases are frequently settled without the filing of a dismissal.

evidence available to date suggests the contrary: the board was informed of the deal by Lindall, did not disapprove it, and looked to the City and not Reilly for years after the settlement as the party responsible, all as the settlement contemplated and Reilly understood.

In its memorandum, the State argues stridently that the City could not have settled the case for the State because that would have been an improper delegation of the State's legal business. That argument, however, simply demonstrates a misperception of what Reilly is arguing: the State told the City that, if it effectuated the purchase of the land, the case against Reilly would be over as far as the State was concerned. This decision was communicated by Lindall to the City and was reiterated by others; it was also communicated to Reilly both directly and indirectly. No discretionary authority was conferred on the City by the State; rather, the City was informed of the State's position, which it could and did utilize in its bargaining with Reilly. The City thus acted as the State's "agent," but only in the sense that it passed along a decision as to terms made by the State and then effectuated those terms by negotiating the transfer of the site from Reilly to itself.

Hence, from the beginning the State acted like a silent partner. The State recognized that it was involved in a dispute between two parties which had a long history of negotiating with each other. Therefore, the State took a very

low profile in the proceedings and frequently relied upon the City to communicate its positions to the court and to Reilly. By the time the purchase of the property finally took place, the State had long since communicated its intent that such a transaction would put an end to the lawsuit insofar as Reilly was concerned. Subsequent to the purchase of the property, the State did nothing for several years to disabuse any of the parties of that notion. Consequently, the State is now bound by that settlement.[6/] Certainly, at a minimum, the required inferences from the available facts compel the conclusion that summary judgment against Reilly on this issue is improper at this time.

B. Given the fact that in hindsight the State's actions may appear equivocal to persons who were not involved in the negotiations in 1971 and 1972, evidence of the State's intentions is relevant and discoverable.

Even though the exhibits in this case are peppered with statements concerning the State's intentions to settle, the State now adamantly refuses to let Reilly discover

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6/ The MPCA was still a relatively new bureaucracy when the original case was filed. Like all fledging bureaucracies it was no doubt in search of its real purpose. It is entirely conceivable that the MPCA's initial noninterest in the Reilly lawsuit evolved into greater interest over the course of the years as the MPCA matured as an institution. However, even as the MPCA's interest in the case warmed, in the early 1970's, the MPCA continued to hold the position that, if the land was sold, the case against Reilly would end, and the State would be left with pursuing the City as the new owner of the land to clean it up.

information concerning those intentions. The State hides behind the fact that there was no written contract between the State and Reilly settling the case. However, the State has consistently refused either to recognize its secondary role in the negotiations as discussed above or to explain its subsequent inaction and apparent confirmation of the settlement following the purchase of the property. Rather, the State persists in its "stonewalling" posture and recites, as rationale for that posture, the narrow view that only evidence of objective manifestations of assent is admissible. That is incorrect.

Whatever else can be said about Kabil Development Corp. vs. Mignot, 279 Ore. 151, 566 P.2d 505 (1977), and Krueger vs. State Department of Highways, 295 Minn. 514, 202 N.W.2d 873 (1972), they stand for the proposition that evidence of subjective intent is relevant and is admissible on the question of whether a contract existed. As the State wrote in its memorandum in opposition to this motion to reconsider, Krueger "signifies that a person's perception of her own actions are relevant in determining whether her actions can be viewed as part of the manifestation of mutual assent." State's memorandum at 11. That is precisely the use to which Reilly hopes to put evidence of the State's intentions. The State's actions in this case, like those of the lawyer's client in Krueger, may appear minimal and equivocal to the outsider.

Evidence of the State's perception of its actions and inactions are relevant to the question of whether those actions and inactions should be viewed as part of a manifestation of mutual assent.

Reilly is entitled to have this Court consider all relevant evidence before a summary decision on that issue is made. See Reilly Reconsideration Memorandum at 19-29. As the State now admits, evidence of the State's perception of its actions and inactions is relevant. Hence, the State's attempt to distinguish Parrish vs. Board of Commissioners of the Alabama State Bar, 533 F.2d 942 (5th Cir. 1976), is to no avail. Where, as here, there is a pending motion to compel discovery on a relevant issue of fact, a motion granting summary judgment on that issue should not be granted.

C. This Court's ruling, by seriously affecting the manner in which this case proceeds, is appropriate for certification under 28 U.S.C. §1292(b).

The foregoing discussion also serves to reiterate the reasons why this Court should at the least exercise its discretion and modify its order to make it immediately appealable under 28 U.S.C. § 1292(b). A controlling question of law is involved[7/] as to which there is substantial ground

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7/ A controlling question of law is one which is "serious to the conduct of the litigation, either practically or legally." Katz v. Carte Blanche Corporation, 496 F.2d 747, 755 (3rd Cir. 1974). Practically, this

for difference of opinion, both as to the result and as to the manner of this Court's resolution thereof. And, as pointed out in Reilly's main Reconsideration Brief, resolution of the question now will in fact ultimately benefit the litigation. It is not simply a question, as the State argues, of whether appellate resolution of this matter now will eliminate the need for further action in this Court. If, as Reilly has pointed out in its main Reconsideration Brief appeal at this time on this issue would help to "preclude[] wasteful and time-consuming duplication of discovery efforts and judicial resources in the event of reversal after trial" of a complex case, certification may properly be granted. Board of Ed. of Township High School Dist. No. 214 v. Climatemp, Inc., 91 F.R.D. 245, 252 (N.D. Ill. 1981).

Nor should this Court be daunted from certification by the State's reference to the fact that questions of State law may be involved. Despite the State's attempt to oversimplify, the matter at issue is not a question of objective theory versus subjective theory; rather, it involves in part a

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7/ (Footnote Continued)

> court's ruling seriously affects the manner in which this litigation may proceed in terms of scope of discovery, differences in proving claims . . ., and potential duplication of effort should this ruling be reversed on appeal.

Board of Ed. of Township High School Dist. No. 214 v. Climatemp, Inc., 91 F.R.D. 245, 251 (N.D. Ill. 1981).

question of whether Reilly is entitled to have the matter of the existence and scope of a settlement contract determined on the basis of all available evidence and only after it has been allowed all relevant discovery, as we believe the law, as shown by cases like Krueger, requires. Moreover, federal courts do not shy away from certification simply because interpretations of state law are involved. See Board of Ed. of Township High School Dist. No. 214 v. Climatemp, Inc., supra.

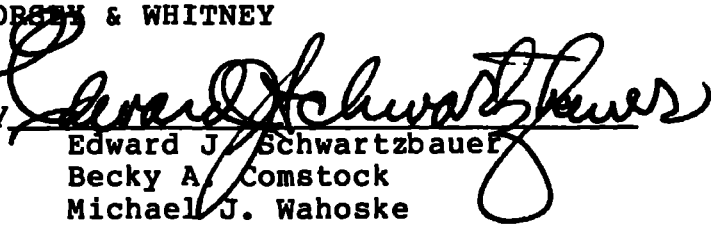
III. CONCLUSION

For the reasons stated above, this Court should either (1) reverse its order of August 25, 1983, (2) vacate that order pending resubmission of appropriate motions at the close of discovery, or (3) certify its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Dated: October 11, 1983.

Respectfully submitted,

DORSEY & WHITNEY

By 

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

REILLY TAR & CHEMICAL CORPORATION, et al.,

Defendants.

Civil No. 4-80-469

AFFIDAVIT OF JAMES E. DORSEY III

STATE OF MINNESOTA)
)SS.
COUNTY OF HENNEPIN)

James E. Dorsey III, being first duly sworn, states as follows:

1. I am associated with the law firm of Dorsey & Whitney, counsel for Reilly Tar & Chemical Corporation in the above matter.

2. Attached hereto as Exhibit 1 is a copy of a memorandum dated April 21, 1970 from W.A. Justin to H.L. Finch which document was taken from the files of Reilly Tar & Chemical Corporation and has been produced for inspection by other parties in the course of this litigation.

FURTHER AFFIANT SAITH NOT.

James E. Dorsey III

Subscribed and sworn to before me this 11th day of October, 1983.

Notary Public

KAREN J FORD
NOTARY PUBLIC - MINNESOTA
WRIGHT COUNTY
My Commission Expires Oct 28, 1985

G-106T

COPY

REILLY TAR & CHEMICAL CORPORATION

Mr. H. L. Finch — St. Louis Park

Mr. W. A. Justin — April 21, 1970

Water Pollution - State Inspection

On April 20, 1970, I conducted a plant tour for Mr. Micheal Lutz, of the Industrial waste section of the Minnesota Pollution Control Agency.

Mr. McPhee, of the St. Louis Park Health Department had requested a tour for himself and Mr. Lutz, on April 17, 1970, however, Mr. Lutz was unable to make it at that time and subsequently came alone on April 20th. Mr. Lutz stated that he preferred to see the problem alone so he might not be influenced by Mr. McPhee.

Mr. Lutz was interested in any underground storage we had and the amount of dripping from treated material stored in the plant. He had seen or heard reports stating that we had underground storage tanks full of holes and that treated material was dripping oil on the ground, which in turn was supposedly contaminating the underground with phenols.

After showing Mr. Lutz our plant and the uses and flow of process water along with plans we had for handling this water, he seemed to feel that we did not have too much of a problem. Mr. Lutz also told me the state was not too concerned about us at this time and that he was here at the request of the city of St. Louis Park, and Mr. McPhee.

Very truly yours,

WAJ

W. A. Justin

WAJ:sjg

cc: Mr. C. F. Lesher

1084421

Exhibit 1

C3:2404